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William Maher, Esq.  
Chief, Wireline Competition Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

**Re: 03-45, Petition of pulver.com for Declaratory Ruling**

Dear Mr. Maher:

I write again on behalf of Callipso Corporation, a leading provider of Voice over Internet Protocol (“VoIP”) services and products. This time, I write in connection with the pulver.com petition concerning regulatory treatment of Free World Dial-Up (“FWD”). We understand that the Commission may be prepared to act favorably on this petition. We adopt the arguments stated in the petition and urge the Commission to declare Callipso’s products and services to be treated in the same way as requested in the pulver.com petition.

1. The rapidly evolving nature of the nascent VoIP industry is well illustrated by the petitioner, FWD, which at the time of its initial filing (Feb. 2003) fundamentally provided only a phone book/routing table application on the Internet for a closed user group. Since that time, FWD has further evolved, as announced on its home page, and is now providing limited connectivity for its subscribers to place “toll-free” calls to numbers in the US (presumably across the PSTN), as well as to customers of other IP-based service providers (e.g. Vonage, 8x8). FWD also is providing additional services, such as voice-mail, and reselling customer premises equipment for origination of VoIP calls. FWD, as it has evolved, no longer represents an easily definable “goalpost” against which to measure other VoIP services providers. The increasingly hybrid and complex nature of FWD and other VoIP services providers suggests that no action should be taken by the Commission on any of the pending VoIP petitions until the record is sufficiently developed, and all pending petitions should be dealt with together, to assure clarity and consistency in the Commission’s guidance in this important area.
2. Different models of VoIP services which provide end users a substantially similar functional experience should be treated similarly. Whether securing for themselves the benefits of VoIP through a broadband connection and a VoIP customer premises device, or through a gateway on the edge of the network, both the users of FWD and Callipso’s customers take advantage of IP protocol conversion and packet transport to enable real-

time communications. The FCC has previously stated that the end user perspective should govern regulatory judgment.

3. Callipso supports the proposition that VoIP telephone calls are jurisdictionally hybrid, and predominantly interstate in nature. Callipso's own empirical tests suggest that 93% of the VoIP calls transmitted over Callipso's managed network are interstate in character.<sup>1</sup>
4. Callipso, like FWD, cannot be classified as a telecommunication service. Rather, like FWD, it is an information service. Like FWD, Callipso's services and products are IP-enabled applications, not telecommunications, and not telecommunications services.
5. The FWD petition relies heavily on the fact that users of the FWD service provide their own connectivity and that FWD provided no transmission capability. While this factor weighs in favor of granting pulver.com the regulatory treatment it seeks, Callipso urges that this factor is not dispositive, and that information service provider treatment should be equally available for VoIP providers that obtain connectivity for customers' use and convenience.
6. The Regional Bell Operating Companies (RBOCs) have exerted self-help by demanding originating and/or terminating access charge payments from the CLECs from whom Callipso obtains PRI circuits for connectivity from the customer premises to the Callipso gateway. If the FCC does not put an end to these aggressive measures, and end the demands for retroactive payment, the debate over the future of competitively provided VoIP will be moot.

### **A Description of Callipso's Services and Products**

Callipso presently markets its IP services primarily to telecommunications companies, such as long distance carriers, or to channel partners such as long-distance resellers, prepaid calling card providers and CLECs, who in turn incorporate Callipso's services as part of their product offerings. The Company also markets services that integrate its VoIP product into hosted and end-user defined computer-driven applications. Callipso's patent pending "ExpressConferencer" product, for example, integrates PC-based applications with web-based setup and billing of VoIP transported conference calls. Future VoIP-enabled applications will infuse consumer devices such as PDAs and other user-defined communications products with voice functionality and extend the versatility and power of IP networks to enterprise customers and individual users.

Callipso manages an IP based network with a nationwide fiber backbone which it leases from third parties. This backbone connects with approximately 40 gateway locations across the US at which Callipso maintains computer equipment utilized for the enhanced IP processing of customer communications. The network implements advanced routing techniques and a broad range of sophisticated compression algorithms. In order to provide customer access to its IP

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<sup>1</sup> Callipso analyzed a sample of approximately 15.5 million calls on Callipso's network during the period Jan. 18 to Jan. 24, 2004, excluding traffic from a single customer that was conducting a single-state test of the network.

services, Callipso acquires PRI ISDN data circuits from CLEC partners, over which VoIP calls originate and terminate.

In addition to providing multi-service capabilities (processing voice, video and other data), allowing Callipso to offer a complete converged communications solution, Callipso provides users integrated and secure web-based real-time network-wide monitoring and management capabilities. This valuable interactive user functionality, developed by Callipso, is an additional application which is enabled by the network, and functionally complements and enhances Callipso's processing and routing of VoIP communications.

At present, many VoIP providers deliver services, such as PTP VoIP, which are functionally similar to a regular circuit switched call. But VoIP will evolve once the backbone is in place and gateway or CPE devices to exploit VoIP and managed IP networks are widely distributed. VoIP then will become a "component" of integrated services that have richer content, such as videophones, voice/data combinations for distance learning, or games, and voice-enabled Internet marketing. There is a danger in imposing regulatory burdens on VoIP calls at this stage because it is today impossible for the LECs to tell which calls are isolated PTP VoIP and which are enhanced with companion video, data or other interactive content.

Application of access charges, now, will inhibit the introduction of enhanced services and deter technological initiatives presently supported by VoIP. Callipso is employing or developing all these services. Its ability to attract capital, sustain existing debt, and grow to provide new services will be destroyed if it is subject to the legacy switched access charge regime.

### **The Operative Definitions**

The following statutory definitions are relevant to Callipso's argument:

*Telecommunications* means "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. sec. 153 (43).

*Telecommunications service* is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. sec. 153 (46).

*Information service* is defined as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. sec. 153 (20).

Callipso concurs with pulver.com's observation, in its petition, that

The statutory definitions rest on the functions made available to the end-user, not the particular types of facilities used. *Report to Congress, supra*, at para. 59. Thus, "an

entity should be deemed to provide telecommunications . . . *only when* the entity provides a transparent transmission path, *and* does not ‘change . . . the form and content’ of the information.” *Report to Congress, supra*, at para. 41 (emphasis added).

### **Applying the Operative Definitions to Callipso: Callipso is an Information Service Provider**

If the Commission concludes that FWD is not telecommunications, and that pulver.com is not providing telecommunications services, as Callipso believes it should, Callipso requests a declaration that Callipso falls under the same treatment. While Callipso charges a fee for its services, and does obtain transmission facilities from third parties for the convenience of its customers, it, like FWD is providing a series of applications and products that are enabled and made more valuable by the IP platform, regardless of the type of facilities used. Callipso submits that it is immaterial whether the user obtains his or her own transmission facilities from third party providers, as in the case of FWD, or whether the VoIP provider does this for the user’s convenience, as in the case of Callipso.

### **The End User’s Perspective: Callipso and FWD Look the Same**

The gist of pulver.com’s argument is that its system is a closed network, in which only members with specialized hardware devices, or approved and adapted softphone software, can talk to one another. Callipso agrees that this bolsters pulver.com’s argument for non-Title II treatment of its FWD service, but urges that the logic of the argument that carries the day on this point cannot be confined to closed networks. The underlying transport at both ends of the FWD call is provided by some entity – cable modem provider, DSL provider, wi-fi provider, satellite provider, ISDN provider, or possibly a dial-up provider. Except in the case of the cable modem provider, the underlying third party facilities, or parts of them, which the user brings to the table, are part of the PSTN.

Callipso urges that the Commission look at these issues from the perspective of the end user, as it has indicated it would do on numerous occasions. As with FWD, Callipso customers are paying for and experiencing an end-to-end functionality. It is immaterial to them that part of the service involves facilities that Callipso has relieved them of the burden of having to obtain by doing so for the customer via Callipso’s CLEC partners. From the perspective of the end user, the services delivered by FWD and Callipso are identical. Regardless of how the call originates, whether over special customer premises equipment, a PC, or a regular phone, the originating facilities are likely part of the PSTN, and just as likely, the terminating facilities are part of the PSTN.

We urge that the only sensible result is to grant pulver.com the regulatory treatment that it seeks. But the logic of that outcome cannot be confined to closed networks. If the Commission believes it untimely to apply this logic in the fashion recommended here, it should delay action on the pulver.com petition until it can develop a comprehensive record that would offer a rationale for disparate treatment of services that look and feel the same to end users, particularly insofar as both terminate on facilities that are likely to be part of the PSTN.

## **The FCC Must Put an End to the RBOCs' Aggressive Self-Help Measures**

In recent months, going back into last year, RBOCs have begun to demand that CLECs carrying VoIP traffic pay access charges or they refuse to carry the traffic. Although the specifics vary from case to case, in general the RBOCs advise CLECs that they believe that some of the traffic carried over CLEC circuits and originating from or delivered to RBOC customers is inter-LATA VoIP traffic. As such, they assert that access charges are due and owing retroactively and prospectively. Rarely if ever do they provide any billing documentation or support for the classification of the calls or the amounts demanded. On notice at that point, however, CLECs are constrained to respond because the RBOCs will terminate service to them, or setoff reciprocal compensation payments, if the CLECs do not capitulate and "pay-up" as RBOCs demand.

The impact of these actions on Callipso has been severe. Callipso has been forced to abandon some markets entirely. In other markets, it has no choice other than to pay CLECs for local lines (via PRI agreements) at rates many multiples greater than prior to the RBOC self-help measures. Other VoIP providers have suffered similar consequences as a result of the RBOC's illegal self-help measures.

The resultant chaos in the marketplace is having many effects upon the nascent VoIP industry; none are positive and all worsening on a daily basis. The RBOC charges, and the uncertainty of current regulatory treatment, also deter investors when emerging facilities-based providers, like Callipso, otherwise are positioned to become larger and more capable competition.

It is the Commission's role, not that of any group of dominant market actors, to decide if, when and in what direction policy concerning VoIP should change. However, absent Commission action, the RBOCs will continue to use their market power to dictate the rules that apply to VoIP services without regard to the Commission's long-standing forbearance policies. Moreover, unless prevented, the RBOCs' illegal actions will force many emerging VoIP providers out of business, leaving the incumbents free to introduce their own VoIP products without substantial competition. The Commission must act now to contain the disorder in the market and prevent further anticompetitive RBOC conduct.

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Callipso wishes to serve as a resource to the FCC in connection with the VoIP rulemaking and the various petitions for declaratory rulings, and stands ready to supplement the record as may be helpful to the Commission's deliberations.

Very truly yours,

//signed//

Kathleen Wallman

Copies to:

Ms. Zaina

Mr. Bergman

Mr. Libertelli

Mr. Brill

Mr. Gonzalez

Ms. Preiss

Mr. Carlisle

Ms. Jackson

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